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Supreme Court, U.S.
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70-131

In The Supreme Court of The United States

OCTOBER TERM, 1970

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ELLER TELECASTING CO. OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. _____

PEOPLE OF THE STATE OF CALIFORNIA,

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Respondent.

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DIVISION ONE

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, entered in this proceeding on December 4, 1970.

OPINION BELOW

The opinion of the Court of Appeal, reported in 13 Cal. App. 3d 296, 91 Cal. Rptr. 468 (1970) appears in Appendix A hereto. The California Supreme Court's denial of petitioner's Petition for Hearing on January 28, 1971, is reported in 3 Cal. 3d, Minutes, p. 4.

JURISDICTION

The judgment of the Court of Appeal was entered on December 4, 1970. The California Supreme Court, the highest state court in California, denied petitioner's Petition for Hearing on January 28, 1971. This petition is filed within 90 days of that date. Jurisdiction is conferred on this court by 28 U. S. C. section 1257(3).

QUESTION PRESENTED

Whether the application of a valid California statute, which prohibits advertising the price of eyeglasses, to an Arizona telecasting company televising such advertising to California viewers by means of a transmitter located in California imposes an unconstitutional burden on interstate commerce.

STATUTES INVOLVED

1. United States Constitution, Article I, Section 8, clause 3:

"The Congress shall have Power

". . . .

"To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

2. California Business and Professions Code, section 3129:

"It is unlawful to advertise at a stipulated price, or any variation of such a price, or as being free, any of the following:

"The examination or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses, or the frames or fittings thereof.

"The provisions of this section do not apply to the advertising of goggles, sun glasses, colored glasses or occupational eye-protective devices, provided the same are so made as not to have refractive values."

3. California Business and Professions Code, section 3131:

"In addition to other proceedings provided for in this chapter, whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, an offense against this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of the board, the Attorney General, the district attorney of the county . . . ."

STATEMENT OF THE CASE

On or about April 29, 1968, petitioner filed a Complaint for Injunction against respondent in the Imperial County Superior Court, State of California. Said Complaint sought to enjoin respondent Eller Telecasting Co. of Arizona (hereinafter "respondent Eller Telecasting") from advertising the services and products of Mesa Optical Company at a stipulated price.

A stipulated Statement of Facts was filed, and is attached hereto as Appendix B. Said Statement of Facts established the following: that respondent Eller Telecasting transmits television programs and advertising to viewers in California; that said advertising originates in respondent's studios in Yuma, Arizona, and is transmitted by signal to respondent's transmitting tower on Black Mountain in Imperial County, California, for transmission to individual television sets in Imperial County, California, Yuma County, Arizona, and the Republic of Mexico; that included in said advertising so transmitted by respondent Eller Telecasting is the advertising of Mesa Optical Company, which includes the advertising of optometrical services and eye-protective devices at a fixed price.

In its Points and Authorities filed in the Imperial County Superior Court, petitioner relied upon the case of Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424 (1963). (Cl. Tr., p. 5.) Respondent Eller Telecasting filed a Memorandum In Opposition to Injunction, asserting that the Head case, supra, was not applicable, and that to apply California Business and Professions Code section 3129 to respondent Eller Telecasting would constitute an unconstitutuional burden upon interstate commerce. (Cl. Tr., pp. 23, 28-30, 32-33.)

The Imperial County Superior Court issued a Memorandum Opinion in which it cited the Head case, supra, as its authority to issue the injunction against respondent Eller Telecasting. (Cl. Tr., pp. 40-42.) Judgment was entered accordingly. (Cl. Tr., pp. 56-57.)

Respondent Eller Telecasting appealed to the California Court of Appeal, Fourth Appellate District, Division One. In its brief, respondent Eller Telecasting contended that the injunction constituted an undue burden on interstate commerce, and that the case of Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, was not controlling. (App. Op. Br., pp. 17, 20, 26-27.) On December 4, 1970, the California Court of Appeal agreed with respondent Eller Telecasting and reversed the judgment. (See Appendix A.)

On January 28, 1971, petitioner's Petition for Hearing was denied by the California Supreme Court, the highest state court in California.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS IN DIRECT CONFLICT WITH THIS COURT'S APPLICABLE DECISION IN HEAD V. NEW MEXICO BD. OF EXAM. IN OPTOMETRY

The judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, has decided a federal question of substance in a way not in accord with, and in fact directly contrary to, this Honorable Court's applicable decision in Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424 (1963).

In the Head case, supra, a New Mexico radio station and newspaper attempted to justify its violation of a state statute prohibiting advertising the price of eyeglasses on the grounds that application of the statute to said members of the local media would impose an unconstitutional burden on interstate commerce. This Court refused to allow such an argument to succeed.

In the instant case, the California Court of Appeal has allowed respondent Eller Telecasting to do exactly what this Court expressly refused to allow the radio station and newspaper in the Head case to do -- justify a violation of a state statute on the grounds that to require respondent Eller Telecasting to obey said statute would be to impose an unconstitutional burden on interstate commerce.

It is not disputed that respondent Eller Telecasting (1) has its transmitter located in California, and (2) uses

that transmitter to carry advertisements to California viewers, which advertisements are illegal under California law. Petitioner submits that respondent Eller Telecasting cannot hide behind the commerce clause of the United States Constitution in order to openly violate California law. This principle underlies the ruling by this Court in the Head case. For this reason alone, petitioner strongly believes that a writ of certiorari should issue.

In the Head case, this Court cited California Business and Professions Code section 3129 as an example of legitimate state legislation enacted to assure high standards of professional competence. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 426. The purpose of the price advertising prohibition contained in such legislation is to "protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 426.

This Court further stated in the Head case as follows:

> ". . . the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483." 374 U.S. 424, 428-429.

Should the respondent herein be allowed to transmit advertising to California viewers which is clearly illegal under California law, from a transmitter located in California itself, simply because respondent's television station is engaged in interstate commerce? Petitioner strongly contends that essentially local television advertising possesses no instant immunity from legitimate state regulations "directly addressed to protection of the public health." As this Court stated in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, in upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate commerce:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' " 362 U.S. 440, 443-444.

II

LOCAL TELEVISION ADVERTISING TRANSMITTED INTO CALIFORNIA BY MEANS OF A TRANSMITTER LOCATED IN CALIFORNIA POSSESSES NO INSTANT IMMUNITY FROM A LEGITIMATE CALIFORNIA STATUTE DIRECTLY ADDRESSED TO PROTECTION OF PUBLIC HEALTH.

The California Court of Appeal held that the action taken by the Imperial County Superior Court involves an "unwarranted extension" of this Court's ruling in Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424. While conceding that Head "presented a similar question for determination and was based upon New Mexico statutes much like the California laws under consideration," the California Court of Appeal determined that "the factual situation involved in this case and that presented in Head are as opposite as 'heads and tails.' " (See Appendix A, p. 8.)

Petitioner respectfully disagrees with the California Court's crucial determination that the factual situation involved in the instant case and that presented in the Head case are as opposite as "heads and tails." Petitioner respectfully contends that the factual situations involved in the two cases are so strikingly similar that the Imperial County Superior Court's judgment can only be characterized as necessary and proper in light of the ruling of this Court in the Head case.

In Head, a New Mexico radio station and newspaper were enjoined from accepting or publishing within the state advertising from an adjoining state (Texas) optometrist which quoted prices or terms for the sale

of eyeglasses. The injunction was issued pursuant to section 67-7-13 of the New Mexico Statutes Annotated which prohibits, among other things, advertising the price or terms of the sale of eyeglasses. The radio station in Head was close to the border of Texas, the adjoining state, and much of the area served by the radio station lay in Texas. This Honorable Court held that the New Mexico statute, as applied in that case to prevent the publication of the proscribed price advertising, did not impose a constitutionally prohibited burden on interstate commerce. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429.

In Head, this Court expressly rejected the argument that the New Mexico injunction would have the effect of preventing communication between the Texas optometrist and the residents of Texas. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429, n. 5.

The New Mexico statute involved in the Head case, like section 3131 of the California Business and Professions Code, was by its own wording made applicable to "any person" and was not restricted solely to optometrists. New Mexico Statutes Ann., section 67-7-13; Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429.

The only factual difference between the instant case and the Head case is that the radio station in Head was located in the state issuing the injunction (New Mexico), whereas respondent's television studio is located in Arizona. However, although respondent's studio is in Arizona, respondent's transmitter is located in Imperial County, California; the transmission from said transmitter is carried to viewers in Imperial County, California, as well as Yuma County, Arizona; respondent maintains a sales office in El Centro, California,

and employs one salesman in California; and respondent derives seven percent of its total revenue from local Imperial County advertisers.

The crucial point is that the prohibited advertising is transmitted to the California public from respondent's transmitter located in Imperial County, California.

In Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, this Court held as follows:

> "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." 362 U.S. 440, 448.

Using this criteria, this Court held in the Head case that application of the statute involved therein neither discriminated against interstate commerce, nor impinged upon an area of interstate commerce requiring uniformity of regulation. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429. Since there are no substantial distinctions between the facts in the Head case and the facts herein, said holding is equally applicable in the instant case.

CONCLUSION

The decision of the California Court of Appeal is in direct conflict with this Court's applicable decision in Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424.

Local television advertising transmitted into California by means of a transmitter located in California possesses no instant immunity from a legitimate California statute directly addressed to protection of public health.

A Writ of Certiorari should issue to review the Judgment and Opinion of the California Court of Appeal, Fourth Appellate District, Division One.

Respectfully submitted,

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Attorney General
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APPENDIX A

OPINION OF THE CALIFORNIA
COURT OF APPEALS,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	Court of Appeal - Fourth Dist.
Plaintiff and Respondent.	FILED Dec 4 - 1970 JOHN R. McDowell, Clerk
v.	Deputy Clerk
ELLER TELECASTING CO. OF ARIZONA,	4 Civ. No. 9907
Defendant and Appellant.	

OPINION

APPEAL from a judgment of the Superior Court of Imperial County. Victor A. Gillespie, Judge. Reversed.

Thadd G. Baker and Dickenson & Sattinger, and David R. Dotson, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, and Alvin J. Korobkin, for Plaintiff and Respondent.

Based upon a complaint filed by the district

was moved to its present location on Black Mountain, Imperial County, California.

6. That Eller Telecasting does not maintain a television studio in the State of California but does maintain a sales office at 713 State Street, El Centro, California, and employs one salesman in the State of California; that Eller Telecasting Co. of Arizona derives approximately 7 percent of its total revenue from local Imperial County Advertisers and receives the remaining 93 percent from local Arizona regional and network programming.

7. That said Mesa Optical Company is a business organization doing business in the State of Arizona and engaged solely in the business of filling optometric prescriptions for optometrists and opthalmologists.

8. That Mesa Optical Company has the following locations in the State of Arizona: One office in Flagstaff, one, office in Yuma, one office in Mesa, two offices in Tucson, and four offices in Phoenix. The above described list constitutes the entire chain of retail stores comprising Mesa Optical of Arizona.

9. That there are no offices or stores belonging to Mesa Optical Company of Arizona doing business outside of the State of Arizona. That Mesa Optical of Arizona is not engaged in the mail order business in any way.

10. That defendant Eller Telecasting Company of Arizona transmits from its studios in Yuma, Arizona, the advertising of Mesa Optical Co., an Arizona corporation, and such advertising is transmitted by a signal to the transmitting tower on Black Mountain and thence upon the airways as above set forth.

11. That the advertising program of Mesa Optical Co. as advertised on KBLU Radio and TV, Yuma, Arizona, is fully in compliance with the laws of the State of Arizona.

12. That said District Attorney is not stipulating to the truth of the following facts, but is stipulating that if a qualified officer of MESA OPTICAL COMPANY OF ARIZONA were called as witness to testify in the above matter, he would testify substantially as follows from his own knowledge and from the books and records of said company:

That Mesa Optical Company of Arizona does not do business in the State of California, and that to revise its advertising program to conform with the objections of the State of California in the Yuma, Arizona area alone would constitute great expense and additional cost to the Mesa Optical Company. At the present time, Mesa Optical Company's advertising program is designed and intended and directed at the population of the State of Arizona, and to require Mesa Optical Company of Arizona to alter its advertising program for the Yuma area alone would cause the company a great financial hardship.

13. That some of the advertising of said Mesa Optical Company of Arizona advertises optometrical services and eye protective devices at a fixed price.

an Arizona corporation, producing television programs and advertising which it transmits over Station KBLU, Channel 13, for which it holds a Federal Communications Commission license.

(2) Since 1966 Eller has maintained a television transmitting tower on Black Mountain which is located in Imperial County, California.

(3) All of Eller's programming emanates from Arizona. Live programs originate in its studio in Yuma, Arizona, are transmitted to the Black Mountain tower and there re-transmitted to viewers in Arizona, Mexico and Imperial County. Network programs are relayed from Phoenix to Eller's studio in Yuma, transmitted to Black Mountain and retransmitted to viewers in Arizona, Mexico and Imperial County.

(4) Eller maintains no television studios in California, but it does have a sales office, employing one salesman, located in El Centro, California. It derives 7% of its income from local Imperial County advertisers; 93% of its income comes from Arizona, regional and network programming.

(5) Mesa Optical Company is a business organization engaged in the business of filling optometric prescriptions for optometrists and ophthalmologists.

It does business only in the State of Arizona and does not engage in mail-order business in any way. It has one office in Flagstaff, one in Yuma, one in Mesa, two in Tucson and four offices in Phoenix.

(6) The advertising program of Mesa Optical Company, as produced by Station KBLU in Yuma, Arizona, is in full compliance with the laws of the State of Arizona. Some of the advertising of Mesa Optical Company advertises optometrical services and eye protective devices at a fixed price.

(7) Mesa Optical Company does not do business in the State of California, and to revise its advertising program to conform to the objections of the State of California in the Yuma, Arizona area alone would cause great expense and additional costs to the company. Its advertising program is designed, intended and directed to the population of the entire State of Arizona, and to require it to alter its advertising program for the Yuma area only would cause the company great financial hardship. [1]

FOOTNOTE 1: As to the facts contained in paragraph (7), the district attorney stipulated that if a qualified officer of Mesa Optical Company were called as a witness, he would testify to these facts from his own knowledge and from the books and records of the company. Since the statement is not refuted, and appears reasonable, we accept it as true.

Eller has appealed from the judgment granting the preliminary injunction and asserts the following contentions on appeal:

I. It was the intent of the California Legislature that the sections of the Business and Professions Code upon which the injunction was issued regulate the practice of optometry and not the broadcasting and transmitting of advertisements by a television station.

II. The injunction is unconstitutional because it deprives Eller from engaging in a lawful business activity and results in a restriction of freedom of the press.

III. Under the factual situation of this case, the injunction constitutes an undue burden on interstate commerce. The case of Head v. The Board of Examiners, 10 L. Ed. 2d 982, which is relied upon by the People is not controlling.

IV. The court exceeded its jurisdiction in the injunction granted by making the injunction broader than the allegations contained in the complaint and the facts as set forth in the stipulated facts.

We have concluded appellant's third contention on appeal is well taken, must be upheld, and requires a reversal of the judgment.

Article I, section 8, clause 3, of the United States Constitution provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The "commerce clause" was designed to establish equality among the several states as to commercial rights and to prevent the confusion which local jealousies or interests might be disposed to introduce and maintain. (Veazie, et al. v. Moor, 14 How. (U.S.) 567, 574 [14 L. Ed. 545, 548].) Its purposes have been stated to be, " . . . to create an area of free trade among the several States." (Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 [74 S. Ct. 396, 403]), and " . . . to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation." (Commonwealth of Pennsylvania v. State of West Virginia, 262 U. S. 553 [43 S. Ct. 658, 665].)

Under the agreed facts there can be no doubt appellant Eller's television station is engaged in interstate commerce, and respondent does not contend otherwise. It is also apparent the injunction issued by the Imperial County Superior Court imposes a restraint upon that commerce. That fact alone, however, is not determinative.

> "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (Huron Portland

Cement Co. v. City of Detroit, Mich., 80 S. Ct. 813, 818 [362 U.S. 440, 448].)

The provisions of the Business and Professions Code regulating optometry and proscribing fixed price advertising in California are a legal exercise of this state's police power reasonably related to the public health and welfare. (Williamson v. Lee Optical of Oklahoma, 75 S. Ct. 461, 465 [348 U.S. 483, 489].) Applied indiscriminately to proscribe fixed price advertising by "any person" within the State of California the statutes do not impose an unconstitutional burden on interstate commerce. (Head v. New Mexico Bd. of Exam. in Optometry, 83 S. Ct. 1759, 1763 [374 U.S. 424, 429].) It is the application of the statutes, by means of the superior court's injunction, to proscribe acts in Arizona, completely legal in that state, which creates the conflict and disruption and casts the undue burden upon interstate commerce.

To uphold the injunction, the Attorney General relies upon Head v. New Mexico Bd. of Exam. in Optometry, supra, which he asserts is directly in point, controls the instant case and is based upon facts almost identical to those involved here. We disagree. While Head presented a similar question for determination and was based upon New Mexico statutes much like the California laws under consideration, the factual situation involved in this case and that presented in Head are as opposite as "heads and tails."

In Head, action was brought in the New Mexico state court to enjoin Head, a New Mexico newspaper owner, and Permian Basin Radio Corporation, a New Mexico corporation operating a radio station in New Mexico, from accepting or publishing within the State

of New Mexico, a Texas optometrist's advertising of optometrical goods and services at a fixed price. Both the newspaper and the radio station were located in Hobbs, New Mexico, but served an area immediately across the border in Texas as well. Texas had no statute proscribing fixed price advertising by optometrists. New Mexico statutes, similar to but broader than those in California, prohibited such advertising. The trial court restrained and enjoined the defendants

> " 'from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts [the optometrist] which quotes prices or terms on eyeglasses . . . or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed, or words of similar import . . . . " (Head v. New Mexico Bd. of Exam. in Optometry, supra, 83 S. Ct. 1759, 1762 [374 U.S. 424, 427].)

The Supreme Court of New Mexico affirmed (New Mexico Bd. of Examiners in Optometry v. Roberts, 370 P. 2d 811 [70 N.M. 90]). The Supreme Court of the United States noted probable jurisdiction (83 S. Ct. 207 [371 U.S. 900]; 9 L. Ed. 2d 163). It also affirmed the judgment granting the injunction (Head v. New Mexico Bd. of Exam. in Optometry, supra), but its holding was carefully limited to the facts existing in the case which was before it. In that connection the Supreme Court stated:

> "We hold that the New Mexico statute, as applied here to prevent the publication

in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce." (Head v. New Mexico Bd. of Exam. in Optometry, 83 S. Ct. 1759, 1763 [374 U.S. 424, 429].) (emphasis supplied)

We think the Supreme Court's ruling in Head gives no indication it would approve the injunction issued in this case by which Eller, a telecasting corporation located in the State of Arizona, is restrained "from transmitting from the State of Arizona into the State of California" advertisements which are completely legal in the state of their origin.

The action taken here by the superior court involves an extension of the ruling in Head, an extension which is unwarranted by the holding of the case and which encroaches into the very area which the concurring opinion warned was not encompassed by the decision.

"Our holding today intimates no view of the constitutionality of several other superficially similar forms of state regulation of broadcasting. First, nothing here said suggests that a system of state regulation, although not in direct conflict with federal law, would pass muster if it were so pervasive and so burdensome upon broadcasters as to interfere substantially with the overall purposes of federal regulation. (Citation) Second, nothing said answers the problem of the situation, factually closer to that at bar

> but legally quite distinct, which would be presented if a State in which nation-wide network material originates sought to restrict network advertising under a statute enacted for the protection only of that State's consumers. Such regulation might well exceed the scope of the State's legitimate interests and involve a constitutionally illegitimate attempt to control communications beyond its borders. (Citations) Third, nothing said here may be read to sustain the constitutionality of applications of local advertising regulations which threaten to make it impossible for a local station to transmit network broadcasts because of their sponsorhip." [sic] (Head v. New Mexico Bd. of Exam. in Optometry, concurring opinion of Mr. Justice Brennan, 83 S. Ct. 1759, 1772 [U.S. 374, 447-448].)

While not precisely within the categories specified in the concurring opinion, the injunction here works the very mischief which the opinion warned would result if an attempt were made to extend the rule of the case beyond the facts then before the court. It requires little imagination to foresee the confusion and conflict which would arise if one state were permitted to impose its individually adopted statutes to bar the transmission of television programs originating in another state. The variety of restrictions and requirements which could result emphasizes our conclusion the injunction issued results in an unconstitutional use of the statutes and imposes an undue burden on interstate commerce.

Moreover, it is apparent the injunction issued by the California court imposes a direct and discriminatory burden upon Eller because it is engaged in interstate commerce. Others engaged in advertising in Arizona, including radio and television stations located in Phoenix, Tucson and Flagstaff, may accept and publish advertisements similar to those placed by Mesa Optical Company so long as such programs are not transmitted across the California state line. The State of Arizona could not similarly discriminate between those engaged in intrastate and interstate advertising within its own borders. (Huron Portland Cement Co. v. City of Detroit, Mich., supra, 80 S. Ct. 813, 818 [362 U.S. 440, 448].) Irrespective of the fact Eller uses a transmission tower located in Imperial County, California, and sells 7% of its advertising to residents of that county, we believe the injunction issued by the superior court must fall, because it constitutes an unwarranted state interference with, and imposes an undue burden upon, interstate commerce.

What we have said requires a reversal of the judgment and makes it unnecessary to discuss the other issues raised by appellant.

The judgment is reversed; the case is remanded to the trial court with directions to enter judgment for the defendant.

AULT
J.

WE CONCUR:

COUGHLIN
J.

WHELAN
J.

APPENDIX B

STIPULATED STATEMENT OF FACTS

1. That Eller Telecasting Company of Arizona is an Arizona corporation doing business in Yuma County, Arizona, and produces television programs and advertising in Yuma, Arizona, and transmits the same over Television Station KBLU, Channel 13, for which channel Eller Telecasting Co. of Arizona holds and owns an FCC license.

2. That Eller Telecasting Co. operates and maintains a television transmitter tower in Imperial County, California located atop Black Mountain, seventeen miles north of Ogilby, Imperial County, California.

3. That all live programming originates at the KBLU studios at 1322 South Fourth Avenue, Yuma, Arizona, and is transmitted from the local studio to the transmitting tower at Black Mountain for further transmission to its viewers in the States of Arizona, California and the Republic of Mexico.

4. That defendant Eller Telecasting Co. of Arizona further receives network programming via a two hop micro wave system from Phoenix, Arizona, relayed from Telegraph Pass to the local studios and further relayed to the Black Mountain transmitter for transmission to the individual television sets in Yuma County, Arizona; Imperial County, California; and the Republic of Mexico.

5. That prior to March 1966, the television transmitter was located at the local studio in Yuma, Arizona; that in March 1966, in order to improve its signal and expand its coverage, the television tower of KB LU TV

attorney pursuant to Business and Professions Code section 3131, and upon a written stipulation of fact, the Superior Court of Imperial County issued a preliminary injunction against the defendant, Eller Telecasting Company of Arizona (Eller), the pertinent portion of which reads:

> "IT IS HEREBY ORDERED, adjudged and decreed that the defendant ELLER TELECASTING CO. OF ARIZONA, an Arizona corporation, its employees, servants and agents, be and are hereby perpetually enjoined and restrained from transmitting from the State of Arizona into the State of California advertisements for MESA OPTICAL COMPANY, an Arizona corporation, or any optical company, advertising that glasses, optical services, and the furnishing of lenses, glasses, and the frames or fittings therefor, can be purchased at a stipulated price."

The primary statute in question, section 3129 of the Business and Professions Code, provides:

> "It is unlawful to advertise at a stipulated price, or any variation of such a price, or as being free, any of the following:
>
> "The examination or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses, or the frames or fittings thereof.

"The provisions of this section do not apply to the advertising of goggles, sun glasses, colored glasses or occupational eye-protective devices, provided the same are so made as not to have refractive values."

Section 3131 of the same code, under which this action was brought, read as follows at the time of the commencement of the action:

"In addition to other proceedings provided for in this chapter, whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, an offense against this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of the board, the Attorney General, or the district attorney of the county.

"The proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that no undertaking shall be required in any action commenced hereunder."

The facts as revealed by the written stipulation are:

(1) Eller, a telecasting company, is

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Supreme Court, U.S.
FILED
JUN 10 1971
E. ROBERT SEAVER, CLERK

No. ~~1018~~ 70-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*

v.

ELLER TELECASTING CO. OF ARIZONA, *Respondent.*

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

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BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1616

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*

v.

ELLER TELECASTING CO. OF ARIZONA, *Respondent.*

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the decision of the California Court of Appeal, that a California statute unduly burdened interstate commerce when it was applied to enjoin an Arizona television station from broadcasting certain price advertising addressed to Arizona viewers by an Arizona optical firm doing business solely in Arizona and seen only incidentally by distant California viewers, is in accord with the decision of this Court in *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424.

STATEMENT

The Court of Appeal stated in its opinion (Petition, Appendix A, pp. 3-5) the following stipulated facts:

"(1) Eller, a telecasting company, is an Arizona corporation, producing television programs and advertising which it transmits over Station KBLU, Channel 13, for which it holds a Federal Communications Commission license.

"(2) Since 1966 Eller has maintained a television transmitting tower on Black Mountain which is located in Imperial County, California.

"(3) All of Eller's programming emanates from Arizona. Live programs originate in its studio in Yuma, Arizona, are transmitted to the Black Mountain tower and there re-transmitted to viewers in Arizona, Mexico and Imperial County. Network programs are relayed from Phoenix to Eller's studio in Yuma, transmitted to Black Mountain and re-transmitted to viewers in Arizona, Mexico and Imperial County.

"(4) Eller maintains no television studios in California, but it does have a sales office, employing one salesman, located in El Centro, California. It derives 7% of its income from local Imperial County advertisers; 93% of its income comes from Arizona, regional and network programming.

"(5) Mesa Optical Company is a business organization engaged in the business of filling optometric prescriptions for optometrists and ophthalmologists. It does business only in the State of Arizona and does not engage in mail-order business in anyway. It has one office in Flagstaff, one in Yuma, one in Mesa, two in Tucson and four offices in Phoenix.

"(6) The advertising program of Mesa Optical Company, as produced by Station KBLU in Yuma, Arizona, is in full compliance with the laws of the

State of Arizona. Some of the advertising of Mesa Optical Company advertises optometrical services and eye protective devices at a fixed price.

"(7) Mesa Optical Company does not do business in the State of California, and to revise its advertising program to conform to the objections of the State of California in the Yuma, Arizona area alone would cause great expense and additional costs to the company. Its advertising program is designed, intended and directed to the population of the entire State of Arizona, and to require it to alter its advertising program for the Yuma area only would cause the company great financial hardship."

ARGUMENT

THE DECISION BELOW IS IN ACCORD WITH THIS COURT'S DECISION IN THE HEAD CASE AND RAISES NO SPECIAL AND IMPORTANT CONSTITUTIONAL QUESTION FOR REVIEW BY THE COURT.

The sole reason advanced by petitioner for the granting of a writ of certiorari is that in its view the decision of the California Court of Appeal is in conflict with this Court's decision in *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963).

We contest this assertion. The California court did *not* disagree with this Court's holding in *Head* that a state has the power to regulate this kind of advertising broadcast by a television station located within the regulating state. The California court did *not* hold the statute in question, the California Business and Professional Code, Sections 3129-3131, to be unconstitutional. Nor did it disagree with the legitimate purpose of the statute to protect the public health. The court did refuse to impose the sanctions of the statute governing the practice of optometry in the State of California upon an Arizona television station carrying

an Arizona optical company's commercial messages originating in Arizona and directed solely to viewers in Arizona. The Court held that application of the California statute, under the facts of this case, constituted an undue burden upon interstate commerce.

We are dealing here with the only television station located in the isolated desert town of Yuma, Arizona, about 60 miles from the nearest population center of El Centro-Brawley, California. The intervening area is bisected by great sand dunes and arid desert. As established by the stipulated statement of facts (Petition, Appendix B), the advertising optical firm is located in Arizona, where the advertising in question is entirely lawful. The optical firm has no office in California and does not engage in mail-order or other business in California. Its advertising messages are designed for and directed to the citizens of Arizona. All programming by the television station is carried from Respondent's studios in Yuma, Arizona to a transmitting tower on Black Mountain in Imperial County, California, and then broadcast back to viewers in Arizona. By reason of the location of the transmitter tower the programming is also seen within television range of Imperial County, California and the Republic of Mexico. Obviously, if the television station may not carry the advertising on its broadcast signal which reaches Imperial County, California, it cannot carry the advertising to its Arizona viewers. Thus, the effects of California's regulation of this advertising would in no sense be "localized." *Cf. Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 721 (1963).

The California Court of Appeal observed that the question presented in the *Head* case involved a New

Mexico statute, a newspaper and a radio station located in New Mexico, and advertising purposely directed to the residents of New Mexico. The Texas optometrist whose advertising was involved in the *Head* case was located immediately adjacent to the border city of Hobbs, New Mexico; the clientele of the Texas optometrist, unlike that of the Arizona optical firm in the case at bar, consisted of persons on both sides of the state border. The advertising in question had a direct effect upon the residents of Hobbs, New Mexico. A major difference, therefore, between the *Head* case and the one presently before the Court is that only the former presented a real rather than an academic problem involving residents of the regulating state.

In *Head,* the court held only that "the New Mexico statute, *as applied here* to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce." 374 U.S. at 429; emphasis supplied. Mr. Justice Brennan, concurring, cautioned that the decision was limited in its meaning (374 U.S. at 447):

> "Our holding today intimates no view of the constitutionality of several other superficially similar forms of state regulation of broadcasting. First, nothing here said suggests that a system of state regulation, although not in direct conflict with federal law, would pass muster if it were so pervasive and so burdensome upon broadcasters as to interfere substantially with the overall purposes of federal regulation. *Cf. Allen B. Dumont Labs* v. *Carroll, supra.* Second, nothing said answers the problem of the situation, factually closer to that at bar but legally quite distinct, which would be presented if a State in which nationwide network material originates sought to restrict network ad-

> vertising under a statute enacted for the protection only of that State's consumers. Such regulation might well exceed the scope of the State's legitimate interests and involve a constitutionally illegitimate attempt to control communications beyond its borders. *Cf. Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775. Third, nothing said here may be read to sustain the constitutionality of applications of local advertising regulations which threaten to make it impossible for a local station to transmit network broadcasts because of their sponsorship. While the State's interest might be no different from that protected by this New Mexico statute, the more drastic effect of the regulation upon the exercise of the broadcaster's federal license and his access to network material might well require a different result. All that the Court decides today is that this New Mexico statute may constitutionally be enforced against radio broadcasters equally with other news media doing business in New Mexico."

The California Court of Appeal commented thereon in its opinion (Petition, Appendix A, p. 11):

> "While not precisely within the categories specified in the concurring opinion, the injunction here works the very mischief which the opinion warned would result if an attempt were made to extend the rule of the case beyond the facts then before the court. It requires little imagination to foresee the confusion and conflict which would arise if one state were permitted to impose its individually adopted statutes to bar the transmission of television programs originating in another state. The variety of restrictions and requirements which could result emphasizes our conclusion the injunction issued results in an unconstitutional use of the statutes and imposes an undue burden on interstate commerce."

It is significant that it was a California court which so held and the Supreme Court of California which denied hearing in the case. Both may be presumed to be sensitive to the interests of that state in the enforcement of its statutes.

The obvious purpose of the price advertising law in the State of California is to prevent professional optometrists from competing with one another by cutting price to the detriment of the quality of professional service. The present case before the Court is not even remotely concerned with the profession of optometry in California. If we examine the reason for this statute, it makes no sense whatever to extend these sanctions to an Arizona broadcaster transmitting advertising for an Arizona optical company to Arizona viewers, especially when most of the station's viewers in California reside some 60 miles or more from the nearest office of the optical company at Yuma, Arizona.

Thus, it can be seen that what is presented here is not a conflict between the decision below and this Court's prior decision in *Head,* but merely the assertion by the California Attorney General of an alleged error of interpretation in the state court's refusal to extend the result in *Head* to a significantly different situation.

The California Court of Appeal correctly concluded that the superior court's injunction to proscribe acts in Arizona—acts completely legal in that state—cast an undue burden on interstate commerce. It is clear that the threatened harm to the State of California and its citizens, under the facts of this case, was so academic and insubstantial as to be outweighed by the burdensome, direct and substantial economic harm which

would be caused to the Arizona optical company and the Arizona television station if the lawful advertising in Arizona were effectively prohibited. See *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714, 719 n. 5 (1963).

In sum, the decision of the Court of Appeal is wholly consistent with the *Head* decision; it does not lay down any new constitutional precept; it does not have direct application to any but the peculiar facts of this case; and it is correct.

CONCLUSION

In view of the foregoing, there are no special and important reasons for the Court to review the decision below, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 1971

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PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 70-131

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ELLER TELECASTING CO. OF ARIZONA,

Respondent.

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 12, 1971, and (2) granting the petition. As grounds for this motion, petitioner states the following:

TWO VACANCIES ON THE COURT EXISTED ON THE DATE OF DENIAL, AND TWO JUSTICES VOTED IN FAVOR OF GRANTING CERTIORARI

In order for certiorari to be granted by this Honorable Court, it is necessary that four Justices vote in favor of granting certiorari.

On the date of denial of the petition herein, there existed the extraordinary situation of there being two vacancies on the Court. Mr. Justice White and Mr. Justice Blackmun voted in favor of granting certiorari.

When the two vacancies on the Court are filled, the two new appointees may join Mr. Justice White and Mr. Justice Blackmun in being of the opinion that certiorari should be granted.

Therefore, petitioner respectfully requests that the Court grant rehearing of the order of denial, either before or at the time the two vacancies on the Court are filled, so as to allow the two new Justices to vote on the petition for writ of certiorari. Their affirmative votes would result in the granting of certiorari in this extremely important and timely case.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing on the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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